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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 5, Original.

STATE OF NEW JERSEY,
Complainant,

against

STATE OF NEW YORK and CITY OF NEW YORK,
Defendants,

COMMONWEALTH OF PENNSYLVANIA,
Intervenor.

ANSWER OF THE STATE OF NEW JERSEY TO THE AMENDED PETITION OF THE CITY OF NEW YORK.

THEODORE D. PARSONS,
Attorney General of New Jersey,
Solicitor for the State of New Jersey.

ROBERT PEACOCK,
Deputy Attorney General.

OSCAR R. WILENSKY,
KENNETH H. MURRAY,
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To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

The State of New Jersey answering the Amended Petition of the City of New York respectfully says that:

1. The State of New Jersey (hereinafter called "respondent") raises no objection to Paragraph 1 of the Amended Petition (hereinafter called "petition") provided the said proposed diversion is made exclusively within the State of New York and provided that adequate compensation release flows to augment the low flow of the Delaware River be made by the City of New York.

2. Respondent admits Paragraph 2.

3. Respondent admits Paragraph 3 of the petition, but avers that the decree (283 U. S. 805) was based upon the

finding by the Special Master that the then proposed diversion of 600,000,000 gallons of water daily by petitioner was excessive and that such diversion be reduced to the point where it is clear that the amount permitted to be taken would not inflict substantial damage to New Jersey or its citizens and would not deprive New Jersey of any greater part of the benefits of the Delaware River than the State of New Jersey should be expected, in all equity, to yield to the other states having a common interest in the river. The effect of the decree was that any diversion by the City of New York of more than 440,000,000 gallons daily under the release formula adopted by the Court would indicate a substantial damage to New Jersey and its citizens and a greater damage than New Jersey should be required to bear.

4. Respondent admits the allegations of Paragraph 4.

5. Respondent does not admit that New York City's water supply facilities are overtaxed. Respondent recognizes the duty of each state to plan, build and construct the water supply facilities which each state estimates that it may need to meet its future anticipated increased population and industrial water demands. Respondent is not convinced of the City of New York's estimated future requirements. Respondent, however, does concur with the petitioner in its object, to prepare adequate water facilities for its population. Respondent contends that the City and State of New York should be permitted to make the diversion conditioned, however, upon providing adequate release flows for the State of New Jersey and other interested states. That the City and State of New York be limited to this diversion from the Delaware River for any future requirements of the City and State of New York and not beyond the 800,000,000 gallons a day presently applied for.

The respondent estimates that its growth and its industrial development indicates an equal or greater need at the present time than that of the City of New York. Respondent avers that its need for immediate water developments is more critical than that of the City of New York,

but advocates co-operation between the states having a common interest in the Delaware River by taking into consideration their present and future reasonable needs but without unduly injuring the flow of the river. Respondent avers that the states having a common interest be entitled to satisfy their reasonable water needs from the river but at the same time requiring adequate provision be made for augmenting the river during periods of low flow, but permitting diversions during periods of excessive flow.

6. Respondent admits Paragraph 6.

7. Respondent is without sufficient information to form a belief as to the allegations of Paragraph 7 and, therefore, leaves petitioner to its proofs thereof.

8. Respondent is without sufficient information to form a belief as to the allegations of Paragraph 8 and, therefore, leaves petitioner to its proofs thereof.

9. Respondent recognizes that the use and consumption of water in the City of New York will continue to increase but is not convinced that any water shortage will occur as early as the period alleged in Paragraph 9.

10. Respondent does not agree with the estimate of use of the City of New York for the period mentioned but estimates that there will be some lesser progressive increase in years to come.

11. Respondent is without sufficient information to form a belief as to the allegations of Paragraph 11 and, therefore, leaves petitioner to its proofs thereof.

12. Respondent is without sufficient information to form a belief as to the allegations of Paragraph 12 and, therefore, leaves petitioner to its proofs thereof.

13. Respondent is without sufficient information to form a belief as to the allegations of Paragraph 13 and, therefore, leaves petitioner to its proofs thereof.

14. Respondent avers that if the proposal of the petitioner is granted by this Court that the petitioner shall be directed to forthwith proceed with the proposed construction as specified in Paragraph 14.

15. Respondent in the original action denied that diversion by the petitioner from the Delaware River was the most feasible and practical plan for the future water supply needs of the City of New York. Since the Court has indicated in its opinion (283 U. S. 336) that the petitioner has the right to choose the source of its water supply without regard to the economics of the proposal, the respondent in conformance with that ruling does not seek to relitigate that issue at this time. Respondent alleges that although the petitioner has many alternate sources of water supply other than the Delaware River and its tributaries, the respondent, on the contrary, because of its geographical and topographical features, is much more limited in obtaining water from sources other than the Delaware River. Respondent alleges that any future water developments other than that applied for by the petitioner should be made from sources other than the Delaware in order that the rights and needs of the State of New Jersey and the other states having a common interest be fairly and equitably preserved.

16. The respondent alleges that the extent and manner of release flows by the petitioner are of the utmost importance to it and the other states having a common interest in the river. Respondent alleges that the release formula in the original decree has and will prove to be inadequate. Respondent alleges that any diversion beyond the 440,000,000 gallons daily permitted by the original decree, without substantially modifying the release formula upwards, would be detrimental to the interests of the State of New Jersey. The proposed release formula will minimize the damage to New Jersey and will substantially improve the flow of the river during dry periods and thereby provide substantial quantities of water to be made available for the respondent and the other states having a common interest in the river.

17. Respondent admits Paragraph 17.

18. Respondent admits Paragraph 18.

19. Respondent admits Paragraph 19.

20. Respondent admits Paragraph 20.

21. Respondent substantially approves of the proposed release formula contained in Paragraph 21 but alleges that the provisions be reviewed by the Court and, if necessary, more ample and precise language and provisions be considered in order to carry out the spirit and intent of the proposal of the City of New York. Respondent recognizes the right of the Commonwealth of Pennsylvania to suggest modifications to the proposal since it is also a state having a common interest in the river. Respondent respectfully recommends that that state give consideration to the meritorious proposal of the petitioner in an effort to obtain co-operation between the interested states in the use of the river for public water supply purposes to meet the reasonable needs of the individual states.

22. Respondent admits Paragraph 22.

23. Respondent admits Paragraph 23.

24. Respondent admits Paragraph 24.

25. Respondent alleges that since 1834 and up to the present time there has existed in the State of New Jersey the Delaware and Raritan Canal which extends from Bordentown on the Delaware River to New Brunswick on the Raritan River. The Delaware River was the main source of water supply for the canal. The canal was originally used for the purposes of navigation. Approximately 200,000,000 gallons a day was diverted from the Delaware River for use in the canal, and this volume was not returned to the river but diverted from the Delaware Watershed. After the canal ceased to be used for navigation purposes, the respondent acquired control of the canal and authorized its use for domestic and industrial water supply purposes. At the present time approximately 30,000,000 gallons daily or more is used for these purposes. Respondent claims the historical right to the use of upwards of 200,000,000 gallons daily from the Delaware River based upon its future needs and the present operation of the canal. This diversion upwards of 200,000,000 gallons daily was made on the Delaware River below the

point of diversion proposed in the New York City plans. Respondent requests this Court to adjudicate this right to divert as heretofore exercised by the respondent. Respondent alleges that its immediate future needs will exceed 200,000,000 gallons daily and desires adjudication of its right to take its water requirements from the Delaware River. When the flow of the river is improved by the petitioner's proposed releases, the respondent's diversion will not impair the river, but will still provide the river with a better flow than that which would result from the release formula in the 1931 decree of this Court. For that purpose respondent urges the Court to retain jurisdiction and control over the use of waters in the Delaware by any of the states involved in these proceedings.

26. Respondent urges that this Court reaffirm the intent of the previous decree, namely, that any diversion by either of the states shall not constitute a prior appropriation. Respondent further urges that the respondent and the Commonwealth of Pennsylvania each be permitted to take from the Delaware River any of their requirements, so long as they do not unduly injure the rights of any of the states involved. That if any taking by the respondent beyond 200,000,000 gallons a day as alleged aforesaid should create any undue damage to the Commonwealth of Pennsylvania, that the latter state shall at all times have the right to petition this Court for relief. Similarly, respondent urges this Court to decree that if the Commonwealth of Pennsylvania in meeting its water needs shall unduly injure either of the states involved by any diversion, that such injured state shall have the right to petition this Court for relief.

27. Respondent urges that this Court decree that the diversion by either state shall not give any superiority of right over any other state in the enjoinment and use of the Delaware River and its tributaries.

28. Respondent urges that this Court preserve and maintain an adequate minimum flow in the Delaware River during periods of low flow therein to protect public health, industries, fisheries, oysters, recreation, sanitary conditions and favorable salinity conditions.

29. Respondent requests that this Court enter a decree allocating and determining a flexible and equitable apportionment of the available water supply from the Delaware River commensurate with the needs of the respective states except that the City and State of New York be limited to the proposed application for any of its future needs in view of the availability of other sources of water supply to that city and state.

Respectfully submitted,

THEODORE D. PARSONS,
Attorney General of New Jersey, Solicitor for Complainant and Respondent to the Amended Petition.

ROBERT PEACOCK,
Deputy Attorney General.

OSCAR R. WILENSKY,
KENNETH H. MURRAY,
Of Counsel.

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ON MOTION OF CITY OF PHILADELPHIA TO INTERVENE OBJECTION OF STATE OF NEW JERSEY.

Now comes the State of New Jersey, by Theodore D. Parsons, Attorney General of the State of New Jersey, on motion of the City of Philadelphia to intervene in the above cause.

New Jersey joins in the brief of the Commonwealth of Pennsylvania on said motion and objects to the petition of the City of Philadelphia, and respectfully requests this court that said petition be denied.

THEODORE D. PARSONS,
Attorney General.

ROBERT PEACOCK,
Deputy Attorney General.

KENNETH H. MURRAY,
OSCAR R. WILENSKY,
Of Counsel.

I HEREBY CERTIFY that the above has been filed with the Clerk of the Supreme Court, and copies sent to all attorneys in interest.

ROBERT PEACOCK,
Deputy Attorney General.